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Bion Tolman And Lucille Tolman, His Wife; Karl J. Hawkins, Jr. , And Miriam Hawkins, His Wife; Bruce B. Anderson And Dorothy O. Anderson, His Wife; K. Jay Holdsworth And Dona S. Holdsworth, His Wife; And Emerson Kennington And Audrie M. Kennington v. Salt Lake County; Oscar Hanson, Jr., Philip Blomquist And Marvin G. Jensen, Individually And As Members Of The Board Of County Commissioners Of Salt Lake County; Ralph Y. Mcclure, County Zoning Administrator; And Lane Romrow, Director Of Building Inspection Department Of Salt Lake County ; Defendants-Respondents Brief

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Gordon B. Christensen and T. Quentin Cannon; Attorneys for Defendants-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

BION TOLMAN and LUCILLE TOLMAN, his wife; KARL J. HAWKINS, JR. and MIRIAM HAWKINS, his wife; BRUCE B. ANDERSON and DOROTHY O. ANDERSON, his wife; K. JAY HOLDSWORTH and DONA S. HOLDSWORTH, his wife; and EMERSON KENNINGTON and AUDRIE M. KENNINGTON, his wife,

Plaintiffs-Appellants,

vs.

SALT LAKE COUNTY; OSCAR HANSON, JR., PHILIP BLOMQUIST and MARVIN G. JENSON, Individually and as Members of the Board of County Commissioners of Salt Lake County; RALPH Y. McCLURE, County Zoning Administrator; and LANE RONNOW, Director of Building Inspection Department of Salt Lake County,

Defendants-Respondents,

vs.

BILL RODERICK, INC., a Utah Corporation.

Intervenor-Respondent.

Case No. 10935

DEFENDANTS-RESPONDENTS BRIEF

Appeal from a judgment of the Third District Court of Salt Lake County Honorable Leonard W. Elton

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STATEMENT OF CASE

This is an action by the appellants (hereinafter referred to as plaintiffs). Said plaintiffs prayed for a preliminary injunction restraining and preventing the respondents-defendants, Salt Lake County, its officers and employees, from issuing any building or other permit which would effect property controlled by an ordinance which became effective on January 11, 1967, which amended the zoning of 1.22 acres of property located at the southeast corner of 2300 East and 4500 South, Salt Lake County, Utah, from Residential R-3 to Commercial C-1.

DISPOSITION IN LOWER COURT

This case was decided by the trial court pursuant to a hearing on plaintiff's motion for a preliminary injunction. The court after hearing testimony and taking evidence introduced and after submission of memorandum by counsel and argument had thereon and the court having made and entered its Finding of Fact and Conclusions of Law, concluded that all the provisions and procedures required by Title 17-27-17, Utah Code Annotated 1953, as amended, and Title 8-1-9 of the Revised Ordinances of Salt Lake County, were duly and properly complied with in the amending of said zoning ordinance to re-zone said premises from Residential R13 to Commercial C-1, and that the temporary restraining Order then in effect should be va-

cated and the plaintiffs' Complaint dismissed together with defendant and intervenor being awarded their costs.

RELIEF SOUGHT ON APPEAL

The respondents-defendants seek reaffirmance of the trial court judgment based on the record made before the trial court and evidence contained therein as submitted to and heard by the trial court judge.

STATEMENT OF FACTS

Bill Roderick, Inc., is the purchaser, of that certain tract of real estate located on the southeast corner of 23rd East and 4500 South, within the Holladay planning district and is an intervenor-respondent in this appeal. On or about the 3rd day of November, 1966, the intervenor made application to amend the zoning map of Salt Lake County by reclassifying said property from Residential R-3 to Commercial C-1. (Def. Ex. D-20) This application was submitted to the Holladay Planning District for its recommendation. On or about Nov. 18, 1966, the Holladay District Planning Commission recommended approval of the application. The written recommendation was submitted subsequently to the Salt Lake County Commission recommending approval, but conditioned that it conform to the Salt Lake County master plan. (Pl. Ex. P-1).

Salt Lake Planning Commission acted upon this zoning ordinance and recommended disapproval of the application. (Def. Ex. D-23) At the hearing by the Planning Commission, two persons living within the Holladay Planning District were in attendance and made inquiry as to procedures to be followed thereafter. (R. 144-146) Said representatives thereupon advised the people in the area that the application had been denied by the Salt Lake County Planning Commission and that approval of said application was unlikely. (R. 146) Thereupon, the application was forwarded to Salt Lake County Commission for its action, including the recommendations made by the District Planning Board and the Salt Lake County Planning Commission. Because of the recommendation of disapproval by the Planning Commission, a public hearing was required before action by the County Commission. A public hearing on this application was scheduled to be held on the 28th day of December, 1966, along with various other applications for changes of zoning. Notice of said hearing was accomplished by posting a notice of a change of zoning hearing on one public utility pole near the intersection of 23rd East and 4500 South, in front of the subject property. Another notice of the proposed zoning change was posted on a utility pole in front of the property owned by a Mr. Hendricksen, but near the subject property. (Def. Ex. D-56, R. 219-220) A third notice of zoning was posted on a bulletin board on the west entrance of the City and County Building in Salt Lake City. (Def. Ex. D-55). A notice

of said hearing of zoning change applications was published along with other applications in the Salt Lake Tribune on or about the 26th day of November, 1966. (Pl. Ex. P-7)

A hearing in due course was held on the application and information was submitted to the commission presenting facts justifying the change of zoning. Additional facts were submitted by other people in attendance at said hearing. (Def. Ex. D-35)

Said change of zoning was adopted unanimously on December 28, 1966 after taking the matter under advisement. (Def. Ex. D-37) Thereupon, the new ordinance was submitted to the new county commission pursuant to due course of business for signature. (Def. Ex. D-39) Prior to the signature, sometime after the enactment of the ordinance, plaintiffs and appellants petitioned the county commission to rescind its action, (Pl. Ex. P-48), and a meeting without notice to applicant was held and the ordinance subsequently signed. This action to invalidate said ordinance resulted thereby.

RESPONDENTS-DEFENDANTS POSITION

The trial court's decision should be affirmed for the following reasons:

1. That all provisions and procedures required by Title 17-27-17, Utah Code Annotated, 1953, as amended, and Title 8-1-9 of the "Revised Ordinances

of Salt Lake County" were duly and properly complied with in the amending of said zoning ordinance to re-zone said premises from Residential R-3 to Commercial C-1.

2. That the amended zoning ordinance is valid.

3. That the county commissioners did not act in an arbitrary and capricious manner and that they proerly refused to rehear said matter pursuant to the petition of the appellants. That further, appellants' petition for re-hearing was not based on any statutory procedures or by any authority of law.

ARGUMENT

POINT I

SALT LAKE COUNTY PURSUANT TO STATUTORY AUTHORITY HAS THE POWED TO AMEND ZONING ORDINANCES.

The legislature has delegated the power to zone to Salt Lake County so that the need for a protective plan might be met and has provided means for the protection of private property through notice and public hearings. U.C.A. (1953), 17-27-1.

In pursuing its authority to zone a county, a county commission shall perform a legislative function and has wide discretion. The action of the zoning authority is endowed with a strong presumption of validity and the courts will not interfere with a commission's

action unless it clearly appears to be beyond its powers or is unconstitutional. *Gayland vs. Salt Lake County,* 11 U. 2d 307, 358 P. 2d 633.

A presumption of validity and reasonableness attends zoning ordinances and amendments thereto. In 8 *McQuillin,* Municipal Corporations, 3d Ed. 559, Sec. 25.295, it is further said:

> "The presumption of the reasonableness, validity and constitutionality of ordinances applies fully to zoning ordinances and amendments of zoning ordinances. Every intendment in favor of their validity is to be indulged. This is particularly true since zoning is governmental and legislative in character, and constitutes an exercise of the police power to promote the public welfare. It is presumed that the zoning power has been exercised reasonably by the zoning ordinance and that the ordinance is for purposes and within the scope of the police power. That is to say, it is presumed that such an ordinance is designed to promote the public welfare. The court will presume that in enacting a zoning ordinance the (city council) acted with full knowledge of relevant conditions and circumstances . . ."

POINT II

SALT LAKE COUNTY GAVE ADEQUATE NOTICE OF THE HEARING TO BE HELD DECEMBER 28, 1966, AS REQUIRED BY LAW.

Section 17-27-17, Utah Code Annotated, 1953, as amended, provides:

"Before finally adopting any such amendment, the board of county commissioners shall hold a public hearing thereon, at least thirty days' notice of the time and place of which shall be given by at least one publication in a newspaper of general circulation in the county and by posting in three public places *designed to give notice thereof to the persons affected.*" (Emphasis added).

Provisions in statutes requiring notice preparatory to the enactment or amendment of zoning measures typically provide for *constructive* rather than *actual* notice as the publication in a local newspaper for a specified number of times. Ordinances based pursuant to them have been attacked as invalid in that without actual notice the owner has been deprived of his property without due process of law. The courts have rather uniformly held that this contention is groundless and that the statute need not provide for nor the ordinances be passed upon actual notice. See *Wanamaker vs. City Council of El Monte* (1962) 200 Cal. App. 2d 453, 19 Cal. Rptr. 554.

Where the notice of a proposed rezoning hearing is given, by a publication in a newspaper in accordance with the State Statute, *the fact that a property owner effected by the rezoning did not read the particular newspaper in which the notice was published, does not invalidate the notice. Braden vs. Much* (1949) 403 Ill. 507, 87 N.E. 2d 620. (Emphasis added)

The adequacy of particular newspaper publications of the notice required by various zoning statutes

have been questioned in a number of instances. In absence of the particular statutory requirements, the publications need not be given any special notoriety by reason either of the size of print, location in newspapers or number of publications. A single publication notice prior to a hearing to amend a zoning ordinance was held sufficient compliance with the statutory provisions requiring at least fifteen days' notice in *Central Realty Corp. vs. Allison* (1951) 218 SC 435, 63 S.E .2d 153.

> "The tests which will generally determine the questions of whether the notices were posted in public places within the meaning of the statute is whether the posting of the notices in the particular places fulfilled the purpose giving the publicity contemplated by the nature of the notice required." *Wann vs. Re-organized School Dist. No. 6 of St. Francois County,* 293 S.W. 2d 408, 413.

The United States Supreme Court in *Mullane vs. Central Hanover Bank and Trust Co.,* 339 U.S. 206 70 S. Ct. 652. (1950) acknowledged that the requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated,* under all the circumstances, to appraise interested parties and afford them an opportunity to present their objections.

Section 17-27-17, of the Utah Code provides that notice be given by posting in three public places designed to give notice thereof to the persons effected. The following discussion illustrates that the Salt Lake County Commission did observe the statutory mandate and its notice requirements.

(a) The County Did Use Adequate Modes or Manner of Giving Notice in Public Places as Required by Law.

Salt Lake County pursuant to the above mentioned statute posted notice in the Salt Lake Tribune on or about November 26, 1966. Notices were also published in three public places located in Salt Lake County. Mr. Preston E. Evans, employed by the Department of Zoning Administration of Salt Lake County, testified, and in his testimony identified (Def. Ex. D-55), which was a notice of a zoning hearing and testified that he posted a notice of hearing on the south bulletin board of the west entrance of the City and County Building on November 23, 1966. (R. 214-215)

Mr. Clair J. Hardman, also employed by the Department of Zoning Administration of Salt Lake County, testified that he posted two notices of a zoning hearing in this matter on two utility poles, one of which was adjacent to the property, and the other about 200 feet south thereof, in Holladay, Utah. Mr. Hardman was shown and he identified (Def. Ex. D-56) which indicated the location of two of the notices that were posted for the public hearing in this matter. (R. 219-220)

In *Graham vs. Fitz* (1876) 53 Miss. 307, the court was concerned with the notice requirements pursuant to a sale of property pursuant to a trustee's sale. The court said on page 314:

> "It was not the duty of the Trustee to make daily and hourly observations of the three public

places of the notices, so as to insure their remaining posted. It is not true that the displacement of the posted notices by casualty or design would invalidate a sale under them after they had been duly posted. . . . The trustee under this deed of trust, may lawfully sell on the day designated without regard to the fact of wind or rain or some mischievous or evil dispossessed person may have removed one or all of the notices. Any other rule would invalidate such sales. It would place in the power of the mischievous or evilminded persons to defeat every proposed sale under such deeds of trust. Any such rule is impractical, impolitic, and title would be so insecure under it as to forbid competition at such sales and lead to the sacrifice of property."

(1) Postings Were Made at Public Places as Required by Law.

The courts have held that the posting of notices upon utility poles or fence posts located at the intersection of roads or on road boundaries as being sufficient and that these notices are as likely to be seen as at any other place in the territory. The postings by Salt Lake County were at three public places as required by law. *State ex rel. Grant School Dist. vs. School Board of Jefferson Joint School Dist.* (1958) 4 Wis. 2d 499, 91 N.W. 2d 219.

> "Public places as applied to the requirements of posting notices at public places are those places that afford the most publicity *without regard to the title owner of the property.*" (Emphasis added). See *Whittingham vs. Hopkins,* 54 A. 250, 69 N.J.L. 189.

Where a tree, post or similar object used for posting a notice is in a place exposed to traffic and the public view, posting thereon has been approved as compliance with public "place requirements." 90 A.L.R. 2d 1224.

Courts have also rejected the contention that because the telephone poles were private property and subject to removal by the owner at any time they could not constitute public places. *The court held that if a notice is posted in a public place where the attention of the public is likely to be attracted, the purpose of the law is satisfied regardless of who may own the property on which the notice is displayed.*(5) *Mahon vs. Buechel Sewer Const. Dist. No.* 1 (1962, Ky.) 355 S.W. 2d 683. (Emphasis added)

Government buildings, such as *courthouses*, town halls, and post offices have frequently been held sufficiently public that a notice prominently posted on or in such a building, satisfies the statutory requirements. (Emphasis added) See 90 A.L.R. 2d 1218.

(2) Postings Were Made at Three Public Places.

The county posted three notices at three public places, to-wit: The south bulletin board on the west entrance of the City and County Courthouse building, the utility pole located at the intersection of 23rd East and 4500 South adjacent to the property in question and the utility pole approximately 210 feet south of the

(5) See also **Schroeder vs. New York**, 371 U.S. 208 (1962), 83 S. Ct. 279.

intersection at 4500 South and 23rd East adjacent to the property owned by Mr. H. R. Hendricksen.

In *Graham vs. Fitz* (1876) 53 Miss. 307, the court held that the requirement of notices to be posted in three public places was also complied with where one of the notices was posted on the inside of the post office door which was closed every Sunday after 10:00 a.m. and another notice was posted on the Courthouse door in the same town. The Courthouse and the post office being within 150 yards of each other. The court stated, "that if 150 yards is to be shown a distance to separate two public places, what space shall be adopted as great enough. The law has no rule on the subject."

Also in *McFarlane et al. vs. Witney* (1940) 134 S.W. 2d 1047, the court upheld posting on a Courthouse and and a service station which was 400 feet from the Courthouse; and the court stated in this case that the property where the notices were posted were in no way connected through ownership.

The plaintiffs in the above entitled matter question whether or not the notices posted by Salt Lake County provided plaintiffs with proper notice of the zoning proceedings. What could afford more notoriety than notices posted on or near the vicinity of the property in question? The Supreme Court of Utah has stated in the case of *In Re. Phillips, Estate,* 86 P. 358, 44 P. 2d 699, 703 (1035).

> "An affirmative rule of what is sufficient depends so much upon the situation in every county,

and perhaps the situation of the cases themselves, that hard and fast rules cannot be enunciated."

Caldwell vs. Moffat (1919) 215 Ill. App. 583, held that although the statute provided for posting of notices in three of the *most public places* in town or district in the vicinity of the road to be widened, altered, vacated or laid out; even if the posting was not in strictly one of the most public places in town, the failure to conform to a strict construction of the law in respect to this one particular notice was but a mere irregluarity and did not destroy the jurisdiction of the highway commissioners. (Emphasis added)

(3) The Places of Posting were Designed to Give Notice Thereof to the Persons Affected as Required by Law.

The person or persons charged with posting notices in public places must necessarily exercise and are entitled to exercise at their discretion in the selection of locations of the posts where these postings are in public places and further, no one may complain that in his judgment the notices should have been placed in other public places.(5) And it is not important to that a notice cannot be read by travelers while riding down the high-

(6) The Notice requirement pursuant to the Utah Code Annotated (1953) 17-27-17, does not contain the language **in three of the most public places,** but states only in three public places.

(7) Notice to those persons interested in the zoning proceedings themselves would be in the vicinity of the property to be effected; and as cited supra, two of the public places namely the two utility poles were located in the vicinity of the property in question. The courthouse which was selected as the third public place seems a logical choice and is designed to give notice thereof to the persons effected as required by law.

way in their automobiles and that no such requirement is contemplated by the statute itself. It is further not necessarily determinative of the question on the posting that all of th notices can be read by one standing on the highway or road. *Wann vs. Re-organized School Dist.* (1956, Mo.) 293, S.W. 2d 408.

(b) The Legal Description Used by the County in the Notice of the Zoning Hearing was Adequate.

The boundaries of the legal description of the property in question must only be described with reasonable certainty and with a definiteness sufficient for identification. (*Speroni vs. Board of Appeals of City of Sterling,* 368 Ill. 568, 15 N.E. 2d 302.) Zoning ordinances have been upheld, even though there have been minor inadequacies in the description of the boundaries. 39 A.L.R. 2d P. 766.

Section 17-27-17, Utah Code Annotated, provides: "That 30 days' notice of the time and place of which shall be given by at least one publication in a newspaper of general circulation in the county . . ." That on or about November 26, 1966, Salt Lake County caused to have published in the Salt Lake Tribune notice of the zoning hearing of the subject property. Plaintiffs in this action have made argument in their brief that the description in the notice published by Salt Lake County was inadequate. Zoning ordinances have been upheld in several cases, even though there have been minor inadequacies in the description of the boundaries. (See *Ciaffone, et al. vs. Community Shopping Corpora-*

tion, et al. 77 S.E. 2d 817. *Speroni vs. Board of Appeals of City of Sterling,* (1938) 368 Ill. 568, 15 N.E. 2d 302. The courts in these cases illustrated in their reasoning that the requirement in the legal descriptions pursuant to public notice is a test of whether or not the description is reasonably certain and with a definiteness sufficient for identification.

Mr. Ralph Y. McClure, the zoning administrator for Salt Lake County, and having been employed by Salt Lake County about fifteen years, testified that it was possible to locate the property pursuant to the description used by the County, and he further testified that the property was described as reasonably as the description used on tax notices. In fact, he was asked the following question: "Does it describe the property as reasonable as the actual tax description?" Answer: "Well, it's my opinion it's easier to decipher our description than the tax notice's." (R. 208, 209)

He further testified that the descriptions are not the same as the tax notice descriptions for the fact that most of the legal descriptions the county receives are several descriptions and that the Salt Lake County Zoning Administration combines the descriptions into one and describes just the subject property. (R. 209)

The courts have held on many occasions that the subject property need not be described perfectly, so long as the recipients of the notice can reasonably ascertain from the description that the property in which they are interested may be effected by the enactment. In

one case, an ordinance was held valid despite the fact that the description of property affected by it was different from the property described in the notice pursuant to which it was passed. See *Bregar vs. Britton* (1954, Fla.) 75 So. 2d 753, cert. den. 348 U.S. 972, 99 L. ed. 757, 75 S. Ct. 534. (By implication) The court in this case pointed out that it appeared that the property affected by the ordinance was included in the property described in the Notice.

The plaintiffs, in their brief at page 20, make mention of the effectiveness of newspaper publications and cite a comment by Justice Black in the case of *Walker vs. Hutchinson,* 352 U.S. 112, 116 (1956). That case dealt with a condemnation of an individual's own property in a proceeding instituted by a City against a landowner and that notice of the proceeding to determine the land owner's compensation was given only by publication in the official City newspaper as authorized by statutes then in force. The facts in the Walker Case are far different than the situation in this matter and the comments by Justice Black would in no way be valid law as to the fact situation in the present case. It can well be understood why in a condemnation proceeding against a landowner he was denied due process of law by publication only in a newspaper. The plaintiffs and appellants in this action in no way have a proprietary or possessory interest in the subject property in the above entitled matter located on the southeast corner of 2300 East and 4500 South, Salt Lake County, State of Utah, and they would not be subject to the same

rules and principles of law as commented on by Justice Black in the Walker case, as cited supra.

(c) The County Caused Writings and Posted Notices to be Exposed to View of the Public for the Required Period of Time.

It is well established that notice was published in the Salt Lake Tribune on or about November 26, 1966. It has further been established that Mr. Evans posted one notice at the south bulletin board on the west entrance of the city and county building. (R. 215) It is further established and uncontradicted, that Mr. Hardman posted two notices on utility poles located at two public places in Salt Lake County, Holladay, Utah. (R. 218-219)

Plaintiffs' own witness, Mr. Marvin W. Wallen, identified plaintiff's Exhibit Number 54 and testified as to remnants of red markings peculiar to zoning notices posted on the above mentioned utility poles. (R. 174-175) Further Bill Roderick, Inc., intervenor, produced a witness, Mr. Deon Leon Ekins, an uninterested party in this action, (R. 107) who stated that he traveled along 23rd East and 4500 South, Holladay, Utah, daily during the period of November, 1966 through Christmas, 1966, that he and a friend were traveling along 23rd East just south of 4500 South, going skiing, the vicinity of the subject propery, and that his friend brought his attention to a notice of zoning change. (R. 105) He was asked the following question by Mr. Everett E. Dahl: "You were able to see the zon-

ing signs from your automobile?" Asnwer: "Uh huh" (affirmative R. 106). He further stated, "We could see them real good."

He was shown plaintiff's Exhibit Number 2, (the type of zoning notice used by Salt Lake County and containing the red markings) and he stated that he remembered the red letters on the notice that he had seen. (R. 106) Mr. Ekins was further asked by the court if he looked at the pole and the witness testified that he did look at the pole. (R. 110)

Plaintiff produced several witnesses all of whom testified that they had not seen the notices that were posted by Salt Lake County in the vicinity of the subject property. Negative testimony of witnesses is weightless as against positive witnesses of the defendant and intervenor and does not prove that the notices were not posted on the poles any more than the notice was not published in the newspaper.

Plaintiffs raise the argument that Salt Lake County in no way introduced any evidence as to the policing of these notices by the County during this 30 day period prior to the hearing itself. A reading of Section 17-27-17, Utah Code Annotated, in no way sets forth the requirement of policing the notices posted by Salt Lake County. This would raise an interesting problem in that a property owner in the area that was adverse to the zoning change could tear down the posted notices and therefore defeat the posting period by his act. This interpretation would seem to be unreasonable and im-

practical. It appears that a reasonable and valid construction of the statute would be one that the statute requires notice of at *least 30 days* in advance prior to the hearing. This requirement it would appear contemplated a period of 30 days for interested parties and parties to be affected by the zoning ordinance or zoning amendment to be placed on notice of such hearing at least 30 days in advance to allow them enough time for their preparation to appear at the hearing and to be heard. This interpretation seems reasonable in that the statute only requires one notice to be published in the newspaper and does not require the publishing of notices in the newspaper for each day during a thirty day period prior to the hearing. It has heretofore been argued that policing of these notices is not a requirement of law.

POINT III

THE ACTIONS TAKEN BY SALT LAKE COUNTY IN THIS CASE MEET THE STATUTORY REQUIREMENT AND THE PROCEDURE AND ACTION PURSUANT THERETO AND AFFORDS EFFECTED PROPERTY OWNERS THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The writer is aware that the United States Supreme Court has decided questions on this point as to the due process of law issue. One of these decisions, *Mullane vs. Central Hanover National Bank,* 339 U.S.

306 (1950) which was also cited in plaintiff's brief, sets forth the requirement of due process of law as being one that affords to persons effected, notice reasonably calculated under all the circumstances to appraise those parties of the pending action and afford them an opportunity to present their objections. This case involved notice by publication to the beneficiaries of a common trust fund and the court did consider the problem of sufficiency of notice under the due process clause. It should be pointed out that in this case they overruled petitioner's objections to the violation of denial of due process as to the published notice to those persons who were unknown to the trustee. However, the court in the Mullane case, as cited supra, states at page 59, "We recognize the practical difficulties and costs that would be attendant on frequent investigations of the status of great numbers of 'beneficiaries' many of whose interest in the common fund are so remote as to be ephemeral; and we have no doubt that such impractical and extended services are *not* required in the name of due process." (Emphasis added). The court, in this case, further acknowledged that the Supreme Court of the United States had not hesitated to approve the resorting to publication as a customary substitute in another class of cases where it is not reasonably possible or practical to give more adequate warnings, i.e., where people are missing or *unknown.* (Emphasis added) The requirement of notice of a public hearing prepartory to the enactment of zoning measures has typically provided a constructive rather than actual notice, i.e., pub-

lication in a newspaper. These statutes and ordinances passed pursuant to them have on several occasions been *attacked as invalid* and that without actual notice, the owner has been deprived of his property without due process of law. (Emphasis added) The courts have uniformly held that this *contention is without merit and that the statute need not provide, nor the ordinance be passed upon, actual notice.*(5) Plaintiffs' brief cites *Schroeder vs. New York,* 371 U.S. 208 (1962), 83 S. Ct. 279. This again is a condemnation proceeding and it is acknowledged by intervenor that some twenty-two notices were posted on trees and poles in the general vicinity of plaintiffs' property. However, the court in that case was not impressed by the many places that notices were posted, but stated at Page 282, "No such sign was placed anywhere on the *appellant's property.*" The point to be made of this case is that this was a condemnation of an individual's own property and not a case of general notice to many unknown individuals.

It should be further mentioned that the general rule is that personal notice to property owners effected by a zoning regulation or amendment is not a prerequisite to the valid enactment thereof; however, the zoning enabling statute itself sometimes requires public notice for a specified length of time and the holding of a public hearing by the zoning commission. 58 Am. Jur. P. 944, Sec. 10. Zoning.

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(8) See 96 A. L. R. 2d P. 459. Several jurisdictions and court cases are cited therein.

The essence of the issue of whether or not the requirement of due process of law has been met is not the criterion of the possibility of conceivable injury, but the reasonable character of the requirements having reference to the subject which the statute pertains. *Mullane vs. Central Hanover National Bank,* 339 U.S. 306 (1950). As noted above in this brief, we are concerned here with an exercise of a legislative power delegated to the Salt Lake County Commission and it should be noted that there is a fundamental distinction, as regards due process of law, between a legislative hearing and an adversary proceeding. It is not necessary under the requirement of due process of law that interested parties be present at all stages of the legislative deliberations. This requirement is properly applicable only in adversary proceedings. See *Hart vs. Bayless Investment and Trading Company* (1959) 346 P. 2d 1101. A point that should be remembered in this case is that the plaintiffs in this action are residents of the Holladay area, a few of them are neighbors or living adjacent to the subject property in this action. None of the plaintiffs have a direct or proprietary legal interest in the subject property. Their only complaint is that of being affected as residents of the area and subjected in this manner to a zoning change of the subject property. The court in *Benner vs. Tribbitt,* 190 Md. 6, 57 A2d 346, 353, stated, "Exercise of the police power in zoning regulations cannot be governed by a plebiscite of neighbors or for their benefit."

POINT IV

DEFENDANTS DID OBSERVE STATUTORY AND PROCEDURAL REQUIREMENTS.

Plaintiffs in their brief under Point IV, make lengthy argument as to whether or not certain procedures were followed by defendant and whether or not Bill Roderick, Inc., was a proper applicant. This issue is improperly before the court on appeal and should be summarily dismissed on the basis that nowhere in plaintiffs' complaint, (R. 1), is this issue raised and further nowhere in the Trial Record was this issue heard or determined by the lower court.

However, it should be pointed out that Mr. William C. Roderick, President of Bill Roderick, Inc., appeared before the court on the 4th day of May, 1967, at the hour of 10:00 a.m.; (R. 250), he testified that he began negotiating pursuant to the purchase of the property in question located at 2300 East 4500 South, Salt Lake County, State of Utah; and that the actual closing was consummated on November 23, 1966. At that time a Uniform Real Estate Contract was entered into by respondent and intervenor. He further testified that he had also entered into an Earnest Money Agreement prior to the execution of the Uniform Real Estate Contract (R. 251). The hearing on the 4th day of May was for the purpose of determining a bond that would be required to be posted by the plaintiffs in order to restrain the defendants from further action in this matter while

the above entitled action was on appeal to the Supreme Court of Utah. The lower court did issue an order and finding that the plaintiff would be required to file with the clerk of the court a security in the amount of $6,500.00, for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained. This was signed by the lower court on the 18th day of May, 1967. (R. 38, 39) The Order Vacating the Temporary Injunction and the Dismissal of plaintiff's Complaint was signed on the 17th day of April, 1967, (R. 31) and the Findings of Fact and Conclusions of Law were also entered by the court on said date. (R. 33, 34, 35, 36, and 37) Nowhere in said Findings of Fact and Conclusions of Law appears the issue as argued by the plaintiffs in this matter.

Plaintiff further complains that the ordinance is invalid on the basis that certain procedures within the planning commission were not followed in that the list of the property owners within 150 feet of the subject property were not furnished and that no statements were furnished from the property owners in the vicinity expressing their position on the proposed change of zoning. Nowhere in the State Statutes, nor in the County Ordinances themselves, is any such requirement set forth. The procedures complained of must be information that the planning staff likes to have in arriving at their recommendations. Failure to comply with these requirements is not jurisdictional nor man-

datory in the zoning procedures. *Caldwell vs. Moffatt,* 215 Ill. App. 583, (1919).

POINT V

DEFENDANT COMMISSIONERS' ACTIONS WERE REASONABLE AND SAID ACTIONS WERE NOT ARBITRARY OR CAPRICIOUS.

In pursuing its authority to zone a county, a county commission shall perform a legislative function and has wide discretion. The action of the zoning authority is endowed with a strong presumption of validity and the courts will not interfere with a commission's action unless it clearly appears to be beyond its powers or is constitutional. *Gayland vs. Salt Lake County,* 11 U. 2d 307, 358 P. 2d 633. Also a presumption of validity and reasonableness attends zoning ordinances and amendments thereto. 8 *McQuillin,* Municipal Corporations, 3rd Ed. 559, Sec. 25.295.

Even though it may be true that there was information presented to the commission for denial of the amending of the zoning ordinances or as advocated by the plaintiffs in this matter, is is also true that information was presented by Bill Roderick, Inc., the intervenor and respondent, in favor of the change of zoning. *The evidence in the possession of the planning commission and before the county commission, was not introduced into evidence and the matter of reasonableness of the determination by the County Commissioners was*

not an issue during the trial. (Emphasis added (R. 213) It is not the prerogative of the court to substitute its judgment for that of the county commission. *Parkinson vs. Watson,* 4 Utah 2d 191, 291 P.2d 400, and *Gayland vs. Salt Lake County,* 11 Utah 2d 307, 358 P.2d 633.

(a) In Refusing to Permit Certain Property Owners a Rehearing on the Zoning Ordinance Which Had Been Enacted In This Matter, the Defendant Commissioners Acted in a Reasonable Manner and Did Not Act Arbitrarily or Capriciously.

This court has previously held that it would not intervene in the wisdom of the subject legislative action. *Gaylen vs. Salt Lake County,* supra. There was not sufficient evidence to even raise the issue of arbitrary and capriciousness of the county commission in the lower court (R. 213) The plaintiffs did raise an issue of arbitrary and capricious action in the commission's failure to rescind its action taken on January 11, 1967, (Def. Ex. D-39) pursuant to a petition presented to the defendant commissioners on January 10, 1967, (Pl. Ex. P-48), which was nothing more than an ex-party proceeding instituted by the plaintiffs. The procedure taken is not provided for by statute and again only goes to the merits of the wisdom of the legislative action taken by the commission. The mere fact that many names were procured on a petition objecting to the action of the commission is no evidence of the wisdom of the legislative action taken. It affects only legislative expediency which may be considered by the commission.

Plaintiffs further contend that the planning commission acted in recommending a denial of the zoning change prior to its receipt from the Holladay District Planning Commission. It should be noted that the recommendations of the Holladay Planning Commission were merely advisory and its recommendation did not have any particular bearing upon the planning commission's action because the planning commission recommended denial of the zoning change whereas the Holladay District Planning Commission had recommended favorable action. Both the report of the Holladay District Planning Commission and the report of the Salt Lake County Planning Commission were submitted to the Salt Lake County Commission, who eventually made the final decision concerning the zoning.

There is very little evidence in the record concerning the facts dealing with the property in question, and the facts either justifying the zoning or not justifying the zoning of the subject property, except that plaintiffs and persons signing the petition were opposed to it. In order for a court of law to substitute its judgment for the county commission, the evidence must be clear and convincing that the commission acted arbitrarily and capriciously. The plaintiffs conceded during the trial on a direct query from the trial judge that there was no issue to arbitrariness and capriciousness as to the action taken by the county commission. Plaintiffs' only claim to arbitrariness and capriciousness was their assertion that the county commission did not reconsider

and call an additional public hearing on the matter. The petition was filed with the county commission setting forth plaintiffs' objections to the zoning prior to the final action by the county commission in enacting the recommendations of the planning commission, which already were before the commission. (R. 213)

(b) The Re-zoning of the Subject Property was Reasonable and Constitutional.

The subject property is located at the intersection of 2300 East and 4500 South, Salt Lake County, State of Utah, and is bounded on three sides by public streets. It is well to point out to the court that on page 42 of the Master Plan of Salt Lake County, (Def. Ex. D-42) the provision for the interstate system and access roads in the Big Cottonwood District is specified as follows:

> "Circulation within the District will be provided in the future by the planned system of expressways and major arterials which will include 700 Eas Street; the Cottonwood Expressway; 2300 East Street; and 4500 South Street; all to be improved to provide adequate traffic capacity."

The evidence concerning the facts surrounding the zoning is not included in the record on appeal because there was no genuine issue as to whether or not the zoning was reasonable or proper but the issue at trial followed the argument as to whether or not proper notice was given of the public hearing, thereby granting to the complaining parties, the plaintiffs, herein, a right to appear and oppose the matter prior to the decision

by the Salt Lake County Commission. The defendants-respondents' position is that inasmuch as said notice complied with the statutes in each respect, that the rezoning of the property, by the Salt Lake County Commission, was correct and that it was reasonable insamuch as it was based upon the facts and evidence presented by all parties at the time of the hearing, which was noticed up according to statute.

It is well to note at this point that the Supreme Court has consistently ruled that courts will not substitute their judgment for a governmental body charged with the enactment of legislation. The defendant-respondents' position is that the plaintiffs herein improperly challenged the question of reasonableness, and we merely offer a counter argument that it was appropriate and reasonable and therefore constitutional.

(c) The Re-zoning of the Subject Property is Grounded Upon Reason and Based on the Policy of the Statute.

Plaintiffs contend under this section of their brief that the zoning change constituted "spot zoning," and that Commissioner Blomquist was prohibited by law from signing the zoning ordinance. This specific issue did not come up at trial. This is merely a matter of argument raised in the first instance with this appeal. There are not sufficient facts in this record on appeal for the court to attempt to substitute its judgment for the County Commission. The burden of proof rests on those challenging the validity of the ordinance and as

stated in 8 McQuillan, Municipal Corp., 3d Ed. 559, Sec. 25.296, page 562.

> "The rule that the burden of proof is on one asserting the unreasonableness, invalidity or unconstitutionality of an ordinance is applicable with respect to zoning ordinances and amendments thereto. Leastwise, where a zoning ordinance is not invalid on its face, the burden of alleging and proving facts to support the claim of its invalidity is on the party asserting it. *** Consistently, there is no burden on a municipal corporation to show facts establishing the validity of zoning."

> "The burden of proof on one asserting the invalidity of a zoning ordinance extends to the issue of whether or not the ordinance will promote the public safety, health, morals, order, welfare, prosperity or convenience, and it extends to the issue whether or not the classification made by the ordinance is unreasonable, arbitrary or discriminatory.***"

The trial of this case was conducted primarily on the issue of the notice given by the Salt Lake County Commission for a public hearing on December 28, 1966. The problem of spot zoning was given nothing more than lip service. The district re-zoned is relatively a large tract, exceeding one acre, completely surrounded by three public highways, two of which are heavily traveled streets and projected to become major arterial highways. There is a condominium, Carriage Lane, almost across the street and the old established business district a very short distance from the property and

a public school planned for construction within a very short distance to the East of the property.

The Supreme Court of Oregon in 1954 in *Shaffner vs. City of Salem,* 268 P.2d 599, had occasion to decide a similar case of spot zoning concerning a service station. This court cited McMullin on Municipal Corporations as cited above.

Plaintiffs have also attempted to make certain improper inferences as to Mr. Roderick and Commissioner Blomquist on the basis that Mr. Roderick said that he knew Commissioner Blomquist business-wise. (R. 254) These allusions in the brief serve no useful purpose on the appeal of the issues in this case, except in an attempt, perhaps, to insinuate that the zoning change was accomplished by unsavory and unbusinesslike methods and that the obtaining of the zoning was improperly done. The zoning ordinance was acted upon and approved by a commission composed of Commissioners Larson, Jenson and Creer, prior to two of them leaving office at the conclusion of the year 1966. The ordinance was acted upon by Commissioners Blomquist and Hanson shortly after they assumed office. There is nothing in the record on appeal that justifies such a suggestion by the plaintiffs as respects Commissioner Blomquist, one of the defendants-respondents. As a closing point:

The *Linden Methodist Episcopal Church vs. Linden,* cited on page 54 of plaintiffs' brief, is not in point. In

that particular case, the applicant for change of zoning was actually a member of the zoning committee, and the changes of zoning that said applicant requested were passed on by the other councilmen on this committee, solely on the basis that he had served faithfully to the city for six years and deserved something. Further, in that case there was no evidence or testimony presented to said council. This is far removed from the situation in the present case.

(d) (See below.)

(e) The defendant-respondents consider the subtitles of paragraph (d) and (e) of Point V in said plaintiffs' brief to be more in the nature of argument and conclusion and are not therefore considered further, as it has been amply covered in the brief heretofore.

CONCLUSION

It is a clear statutory construction that any questions as to the validity of an ordinance or its application in any case must be resolved with a presumption of the validity of said ordinance. As indicated in the brief, action such as the rezoning amendment herein are legislative actions by properly elected governing body, in this case, the Salt Lake County Commission. The action of such a legislative body, having complied with the ordinances, carries with it a presumption of validity.

The defendants-respondents' conduct and actions, as part of these legislative proceedings, were proper in every way as to procedure, notice, and due process.

The burden of showing that this ordinance is invalid is very heavy upon plaintiffs and their evidence must be so convincing and overwhelming as to remove any doubtfulness as to the validity of the ordinance. This procedure also affects not only this zoning ordinance, but perhaps some twelve hundred other zoning ordinances passed since the adoption of the basic statutory laws pertaining to zoning. The upsetting of this particular zoning ordinance would place in doubt all other zoning ordinances passed by the Salt Lake County Commission.

The Holladay District Planning Commission acted. The Salt Lake County Planning Commission acted. A public hearing was noticed up along with others within the county. The hearing was held before the Salt Lake County Commission. After due consideration the commission acted and thereupon the legislative process in such matters was fulfilled in good faith.

Some of the issues are not properly before the court on appeal. The trial judge allowed plaintiffs full opportunity to present its case and had benefit of receiving both oral and written arguments. It is rather basic on appeal that whenever there is a conflict of evidence on a particular issue the respondent is entitled to have the issue reviewed in a light most favorable to that finding. The decision of the lower court should be affirmed.

Respectfully submitted,

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